Nos. 82-1129, 82-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner
v.
GEORGE WILLIAMS, ET AL.,
Respondents

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.,
Petitioners
v.
GEORGE WILLIAMS, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION ON BEHALF OF RESPONDENTS TO PETITIONS FOR A WRIT OF CERTIORARI

RICHARD B. SOBOL
(Counsel of Record)
ABOUREZK, SOBOL & TRISTER
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 775-5960

GEORGE M. STRICKLER, JR.
1419 Richards Building
New Orleans, Louisiana 70130
Attorneys for Respondents

Dated: February 16, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. The available longshore work force on the New Orleans waterfront is 75% black and 25% white. The employers and the unions entered into an express agreement to divide premium grain cargo work 50-50 between blacks and whites. The question presented is whether the division of grain cargo work according to this agreement violates rights secured by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, without regard to the ability of black longshoremen to secure other work on the waterfront?

2. Whether the disposition of this case in the court of appeals is consistent with Rule 52(a) of the Federal Rules of Civil Procedure?

3. Whether the named plaintiffs, black longshoremen on the New Orleans waterfront, may properly represent a class of similarly situated black longshoremen on the New Orleans waterfront in challenging the racial division of grain cargo work?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-1129, 82-1134

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner

v.

GEORGE WILLIAMS, ET AL.,
Respondents

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.,
Petitioners

v.

GEORGE WILLIAMS, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION ON BEHALF OF RESPONDENTS TO PETITIONS FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitions do not make clear what this case is about. At issue is the legality of the division of grain cargo work on the New Orleans waterfront on a 50-50 racial basis, although the available work force is 75% black and 25% white. Until after the trial of this case, this racial division was explicitly required by the terms of the collective bargaining agreement among the Petitioners. Without benefit of a citation to this Court's decision in *State of Connecticut v. Teal*, 102 S. Ct. 2525

(1982), the Petitioners attempt to defend this "open and blatant racial discrimination," *Williams v. New Orleans Steamship Ass'n*, 688 F.2d 412, 415 (5th Cir. 1982), on the basis of a "bottom line" theory, contending that blacks secure enough other work on the New Orleans waterfront to overcome the discrimination in grain work.

The undisputed facts are these:

For many years, the active longshoremen on the New Orleans waterfront have been 75% black and 25% white.[1] For the sole purpose of racially segregating the work force, petitioner International Longshoremen's Association (ILA) chartered two separate longshore locals with the identical jurisdiction. Local 1418 was the local for whites and Local 1419 was the local for blacks.[2] This condition existed until 1980 when the district court in this case ordered a merger of the Locals, ILA App. at 44, and a stay of this Order was refused by both the district court and the court of appeals.

Grain cargo work involves loading of grain onto ships. In the modern era, this function is performed by machines which pump the grain from containers directly into the ship's hold. Because of the relative automation of the task, grain cargo gangs on the New Orleans waterfront, under the terms of the labor agreement, are made up of eight men, rather than sixteen, as are employed for general cargo work. 466 F. Supp. at 665, 673, ILA App. at 5, 20-21. ". . . [W]ork in grain cargo is easier

---

[1] *Williams v. New Orleans Steamship Association*, 466 F. Supp. 662, 667 (E.D. La. 1979), *aff'd in part, rev'd in part*, 673 F.2d 742 (5th Cir.), *reh. denied*, 688 F.2d 412 (5th Cir. 1982), Appendix to ILA Petition (hereafter "ILA App.") at 7-8; NOSA Petition, p. 10; ILA Petition, pp. 7-8.

[2] The parties stipulated that "Local 1418 has an active membership of approximately 750, 744 of whom are white. Local 1419 has an active membership of approximately 3,608, of whom all are black." 466 F. Supp. at 665, ILA App. at 5.

and better paying than other general longshore work, there being a 20 cent per hour premium for such work." 466 F. Supp. at 673, ILA App. at 21. The total grain cargo payroll on the New Orleans waterfront for the three years preceding trial was almost $8 million dollars.[3]

This case was filed in 1971 and tried in the summer of 1974. For many years and until after the trial of the case, the collective bargaining agreement between the unions and the employers contained a clause providing as follows:

> So far as is practical, work is to be divided between members of ILA Locals 1418 and 1419 in grain trimming machine gangs, and/or trimming gangs.

466 F. Supp. at 673, ILA App. at 20. In the words of the district court, "[i]n practice, this meant that grain crews were to be half white and half black, assuming that sufficient longshoremen of both races were available, even though the active black local membership was more than three times greater than the white." 466 F. Supp. at 673, ILA App. at 20-21.[4]

---

[3] See note 5, *infra*.

[4] The language requiring the 50-50 division of grain cargo work was deleted from the labor agreement by the petitioners, effective October 1, 1974—a few days after the conclusion of the trial. 466 F. Supp. at 673, ILA App. at 21. In the district court, plaintiffs contended that the deletion of the contract language did not result in any change in the 50-50 racial division and submitted an affidavit to that effect. Contradictory affidavits were filed by the defendants, but no hearing was ever held on this question. See 673 F.2d at 752, ILA App. at 64. It was not addressed by the district court because of its ruling that the racial division was not illegal .

In its decision, the court of appeals held that:

> Plaintiffs are entitled to a hearing on the issue of post-clause discrimination. We remand this issue to the district court so that all parties may present evidence as to whether or not discrimination continued after the 50-50 clause was deleted.

673 F.2d at 752; ILA App. at 65. Trial in the district court on the issues defined by the court of appeals is scheduled to commence on May 2, 1983.

The plaintiffs' evidence showed, and there was no contest on the matter, that the racial grain clause had been faithfully complied with, and that, both in numbers of blacks and whites in regular grain gangs, and in number of payroll dollars paid to blacks and whites for grain work, the racial division was almost exactly 50-50.[5]

The defendants' defense, as reflected in the Petitions here, was twofold. *First*, they introduced evidence tending to show that the racial grain clause was adopted in the mid-50's at the insistence of the President of the black Local, who feared that worse discrimination would be practiced against black longshoremen in the selection of grain cargo gangs, unless one half of the work was reserved to blacks. 466 F. Supp. at 673, ILA App. 21. *Second*, defendants argued, based on sharply disputed statistical evidence, that even though blacks received less than their proportionate share of grain cargo work, they received enough other work on the New Orleans waterfront to make up for it.[6]

---

[5] At trial, plaintiffs introduced ten exhibits, summarized in the Appendix to this Opposition, which showed the racial makeup of the regular grain gangs of the ten defendant companies employing regular grain cargo gangs. With isolated minor exceptions, the gangs were exactly half white and half black. Three additional exhibits, Pl. Exhs. 131, 132, and 133, showed the annual earnings from all grain cargo work (that performed by regular and non-regular grain gangs) of members of the white and black locals, for the three contract years prior to trial, as follows:

Contract Year	Grain Earnings of Local 1418 Members	Grain Earnings of Local 1419 Members	Local 1419 Earnings As a Percent of the Whole
1970-71	$ 989,644	$ 945,581	48.9%
1971-72	1,194,848	1,161,631	49.3%
1972-73	1,775,952	1,833,170	50.8%
Totals	$3,960,444	$3,940,382	49.9%

[6] Petitioner NOSA also argues in this Court that plaintiffs did not present discrimination in the allocation of grain cargo work as a

In its original decision on the merits, the district court found that the racial allocation of grain cargo work did not violate Title VII. In explaining this conclusion, the

---

separate issue in the district court. NOSA Petition, pp. 13-16. This contention is clearly refuted by the record:

a. Plaintiffs' Amended Complaint, filed with leave of the court on May 3, 1973 (over a year before trial), stated in para. 19, p. 11:

* * * *

(v) Certain kinds of preferred and/or higher paying longshore work is artificially divided between the membership of the defendant local unions. Since the local unions are segregated by race, this practice constitutes a division of work between black and white longshoremen. The work of unloading and loading grain ships, which is preferred because it is less physically demanding than general cargo work and pays a higher hourly wage rate, is equally divided between the membership of defendant Locals 1418 and 1419. The grain crew is thus composed of an equal number of blacks and whites. . . . The equal division of grain work is specified in the collective bargaining agreement between NOSA and defendant Longshore Locals 1418 and 1419. . . . The division of work as described above discriminates against black longshoremen because they outnumber whites in the work force and thus receive a disproportionately small share of work.

b. The Pre-Trial Order in this case, signed by the district court and by all counsel and entered on July 12, 1974, in Part 6, p. 14, lists among "plaintiffs' class claims," the following:

(4) Racial Discrimination in Employment on Grain Gangs

(a) Plaintiffs contend that the following companies discriminate against black longshoremen by employing a disproportionately small number of black longshoremen for Grain Gangs:

Atlantic & Gulf Stevedores
J. P. Florio
Gulf Stevedores
Louisiana Stevedores
Lykes Brothers
Mid-Gulf Stevedores
Strachan Shipping
T. Smith & Son
J. Young & Company

Because employment on Grain Gangs is controlled by the Deep Sea Agreement between N.O.S.A. and Locals 1418 and 1419,

court relied primarily on the evidence concerning the origins of the clause.

> . . . [I]t was the former president of Local 1419 who insisted that the clause be inserted in the Deep Sea Agreement to protect his men and to see to it that they would get a "fair shake."

---

plaintiffs also contend that these defendants also discriminate against black longshoremen as a class.

c. Plaintiffs' Trial Memorandum, submitted on July 22, 1974, at p. 3, included the following as item 5 in its "Summary of the Class Issues":

> 5. *Racial Discrimination in the Employment of Regular Grain Gangs.* Regular grain gangs are gangs that load and unload grain for a particular company. Under the collective bargaining agreement, this work is compensated at a higher rate than general cargo work. This contention is that there is racial discrimination in the employment of longshoremen for regular grain gangs. The collective bargaining agreement provides that one-half of these positions be accorded to members of ILA Local 1418 (white) and one-half to members of ILA Local 1419 (black). (1971-74 Deep Sea Agreement, p. 20, para. 3). Since seventy-five percent of the guarantee men on the waterfront are black, this clause is racially discriminatory. The primary statistical data that will be introduced in support of this contention are exhibits showing that regular grain gangs are one-half white and one-half black.

d. At trial, plaintiffs introduced thirteen separate statistical exhibits relating solely to the issue of racial discrimination in the allocation of grain cargo work. See note 5, *supra*, and the Appendix to this Opposition.

e. In its decision, the district court lists as one of plaintiffs' class claims for decision discrimination in the allocation of grain cargo work:

> In addition to the individual claims . . ., the following are the "class claims," . . . (4) racial discrimination in that various companies employ a disproportionately small number of black longshoremen for grain gangs; . . .

466 F. Supp. at 666, ILA App. p. 7.

At no time did the district court suggest that the issue of the legality of the racial division of grain work was not presented by the plaintiffs or decided by the Court.

466 F. Supp. at 673, ILA App. at 21. The district court added, however,

> This is not to say that we disagree with plaintiffs' position that the division of grain cargo work was discriminatory and that it was accomplished through a segregated union system. We also cannot disagree with plaintiffs, on the facts, that the removal of the contract language was a tactic in the litigation and in response to the dictates of Title VII. We are not prepared, at this point, to say that this suit was not the catalyst for the removal of the clause.

466 F. Supp. at 673-74, ILA App. at 21.

Because of the district court's statement that the division of grain work was discriminatory, plaintiffs filed a motion for reconsideration of the decision not to hold this division violative of Title VII and 42 U.S.C. Section 1981. In an opinion denying the motion for reconsideration, the district court adopted the defendants' "bottom line" theory:

> We agree with defendants that plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall. . . . There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think that the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers.

ILA App. at 40.[7]

---

[7] In addition to challenging the validity of the bottom line defense, plaintiffs on appeal argued, alternatively, that the district court's

The court of appeals reversed and held that the racial division of grain work constituted a violation of Title VII and Section 1981, regardless of the overall earnings of black longshoremen. 673 F.2d 742 (5th Cir. 1982), ILA App. 47.

> Were we to accept defendants' contentions, we would be ruling in effect that an employer may discriminate with impunity as long as it confines such action to some units or departments within the work force while maintaining an overall facade of equality.

673 F.2d at 747, ILA App. at 55. These Petitions followed a denial of rehearing and rehearing *en banc*. 688 F.2d 412 (5th Cir. 1982), ILA App. 73.

SUMMARY OF THE ARGUMENT

It is stipulated that blacks constitute 75% of the available longshore work force on the New Orleans waterfront. There is also no dispute that grain cargo work is paid at a premium over general cargo work, that the employers and the unions (petitioners here) entered into an express agreement for the 50-50 division of grain cargo work between white and black longshoremen, and that this work was distributed in accordance with this agreement. On its face, this employment practice is racially discriminatory. The decision of this Court in *State of Connecticut v. Teal*, 102 S. Ct. 2525 (1982), makes clear that the practice cannot be defended on a "bottom line" theory by arguing that black longshore-

---

statistical analysis was invalid, and that when the statistical data in evidence was properly analyzed it revealed that blacks overall did not receive a fair share of hours or earnings. In its opinion, the court of appeals agreed that the district court's statistical analysis was "flawed," for reasons explained in its opinion, 673 F.2d at 746, n. 7, ILA App. 53, n. 7, but, because of its disposition of the bottom line issue, the court of appeals did not further address this question. If the court of appeals' rejection of the bottom line defense were overturned for any reason, plaintiff would remain entitled to appellate consideration of this alternate contention.

men secure enough other work on the New Orleans waterfront to overcome the discrimination.

There is no issue under Rule 52(a) in this case. The court of appeals rendered its decision on an issue of law on essentially undisputed facts. No factual finding of the district court was overturned. In view of the express agreement to discriminate, the "record permits only one resolution of the factual issue" of intent to discriminate, *Pullman-Standard Co. v. Swint*, 102 S. Ct. 1781, 1792 (1982), and there was no occasion for a remand to the district court for further factfinding prior to a determination of liability.

The ruling of the court of appeals that the named plaintiffs properly represent a class on the grain cargo issue is consistent with the requirements of Rule 23 and is not inconsistent with any decision of this Court. Plaintiffs, as black longshoremen seeking work on the waterfront, are aggrieved by the racial restriction on grain cargo work in the same manner as the other black longshoremen that they represent. There is no suggestion that the plaintiffs were unqualified or ineligible for this work.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The Substantive Question Presented is Controlled by this Court's Decision in *State of Connecticut v. Teal.*

The fact of racial discrimination against blacks in the selection of grain cargo gangs is not subject to dispute. The issue is whether this discrimination is lawful under Title VII and Section 1981 because of other employment opportunities that are available to blacks on the New Orleans waterfront.

The decision of the court of appeals that other work opportunities cannot legitimize the discriminatory racial division of grain cargo work is plainly correct under this Court's decision in *State of Connecticut v. Teal*, 102

S. Ct. 2525 (1982), which was decided after the original decision in the court of appeals.

In *Teal*, the State administered a promotional examination that was shown to have a substantial disparate adverse impact on black employees. The State proved that despite the racial impact of the test, by virtue of its selections from among those who passed the test, the minority proportion of those promoted was higher than the minority proportion of those who applied for promotion. This Court rejected this defense:

> . . . The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the opportunity to compete equally with white workers on the basis of job-related criteria.
>
> * * * *
>
> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.

102 S. Ct. at 2533, 2535. Similarly, here, the discriminatory allocation of grain cargo work denies individual black longshoremen the right to compete equally with whites for this work. This discrimination cannot be defended by showing that blacks as a group receive a fair share of all work on the New Orleans waterfront.[8]

The correctness of the decision of the court of appeals in this case is supported not only by the majority, but also by the dissent in *Teal*. Justice Powell, dissenting, agreed that a "bottom line" defense would be invalid in a disparate treatment case, but argued that when, as in

---

[8] With respect to the overall earnings of class members, the court of appeals stated: "industry-wide earnings of blacks may be relevant on the issue of backpay. This evidence has no place in the liability phase, however." 673 F.2d at 751, ILA App. at 62.

Teal, a *prima facie* case is based solely on racial impact, the employer is entitled to show that overall there is no adverse racial impact. See *id.* at 2536-40.

This case is a disparate treatment case, not a disparate impact case. No racially neutral policy with disparate impact is involved. Rather, there is a facially discriminatory policy which excludes black longshoremen from certain jobs on account of their race. Thus, in *Teal*, all of the Justices of this Court subscribed to principles that sustain the decision of the court of appeals in this case.

No other decision is conceivable. The facts here are different only in degree from a hypothetical employer who announces that no blacks will be permitted to work in a particular job category, on a particular shift, or in a particular department, and then attempts to defend this policy on the ground that other employment opportunities available to blacks result in a nondiscriminatory "bottom line." The attempted defense is unavailing. Section 703 (a) (2) of Title VII, 42 U.S.C. § 2000e-2(a) (2), which makes it an unlawful employment practice for an employer to "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . .", condemns racial allocation of work opportunities, particularly where the share allocated to minorities is below minority availability in the relevant labor pool.

2. There is No Question Under Rule 52 in this Case and No Reason to Remand.

The decision of the court of appeals is not inconsistent with the letter or spirit of this Court's decision in *Pullman-Standard Co. v. Swint*. As the court of appeals carefully explained in denying Petitions for Rehearing based on *Swint*, there are no factual questions subject to

reasonable dispute that are relevant to the court's determination.

> The Court [in *Swint*] made it clear . . . that in applying the clearly erroneous standard to the review of all findings of fact, it was not changing the standard with respect to the review of conclusions of law. The opinion of the Court said "The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." This is precisely the situation involved in the case sub judice.
>
> We held that our review of the district court's finding that there had not been racial discrimination was not bound by the clearly erroneous standard because it was based upon an erroneous view of the law concerning the legal validity of segmented claims. When the plaintiffs presented their grain work claim to the court, they argued that there was discrimination with respect to grain work which was distinct from other discrimination allegedly existing in the industry. . . . The only statement made by the court in which its reason for rejecting the segmented claim is shown was the minute entry of June 30, 1980, which stated, "Since he (the longshoreman) may work various types of cargo at different hours in any given week, the important thing is how he fares overall." This statement was unequivocally a statement of the law of the case and of particular facts found.
>
> • • • •
>
> We found this to be an error in law which is not limited to the clearly erroneous standard of review.
>
> The *Swint* case is not implicated by this Court's opinion. We did not distinguish between ultimate and subsidiary facts, we did not even make mention of such a distinction; we did not review mixed questions of law and fact; and we did not suggest that ultimate findings might be synonymous with legal

> conclusions and therefore reviewable free of the clearly erroneous standard.

688 F.2d at 414-15, ILA App. at 75-76.

The court of appeals also addressed petitioners' argument, also made here, that upon finding that the issue of discrimination in grain cargo work should be decided without regard to the availability of other work on the New Orleans waterfront, the matter should be remanded to the district court for factual findings on the issue of discriminatory intent.

> Petitioners also challenge the propriety of deciding the merits of the grain work claim rather than remanding it once we found the separate claim valid. *Swint* holds that "where findings are infirm because of an erroneous view of law, a remand is the proper course *unless* the record permits only one resolution of the factual issue." 102 S.Ct. at 1792 (emphasis added). This is simply a reaffirmation of a long standing rule of which we were well aware in reaching our decision. A review of the record, particularly the statistics and the overtly discriminatory contract provision, convinced us that there was only one possible resolution to the issue. The evidence shows unmistakably that defendants discriminated purposefully and with a precise quota system on the basis of race in the allocation of grain work. A remand on that issue would be a waste of time.

688 F.2d at 416, ILA App. at 79.[9]

The Petitioners have also argued here that the court of appeals should have remanded to the district court for a determination of the "distinctiveness" of grain cargo work. The issue of "distinctiveness" does not control the disposition of this case. Grain cargo work exists. Millions of payroll dollars are spent on this work each year. It is paid at a higher rate than general cargo work

---

[9] The district court did not find an absence of discriminatory intent, so there was no substitution of judgment in this case as there was in *Swint*.

under the applicable agreement. The Petitioners have openly agreed to exclude blacks from a proportionate share of this work and have done so. Nothing else is relevant to a finding of unlawful discrimination.[10]

3. The Class Certification in this Case Raises No Issue Warranting Review by this Court.

Three of the named plaintiffs, George Williams, Matthew D. Richard, and John T. Aaron, are black longshoremen on the New Orleans waterfront, who sought such longshore work as was available to them. As such, they are personally aggrieved by the racial division of grain cargo work, which artificially restricts the amount of this work that is made available to blacks.

In 1972, the district court ruled that a class action was proper, with plaintiffs serving as class representatives with respect to the grain cargo issue and all of the other issues raised by the Complaint. Discovery was conducted on a class-wide basis, and the case was tried as a class action for a total of nineteen trial days. Voluminous briefs on the class issues were filed by all parties.

Almost five years after trial, in its decision on the merits, the district court concluded that plaintiffs had failed to prove any of their claims against the employer

---

[10] This is not a case where, in the absence of any direct evidence of an intent to discriminate, a plaintiff relies on statistical evidence relating to one or a few jobs among many in a workforce. See, e.g., *Swint v. Pullman-Standard Co.*, 539 F.2d 77, 94-95 (5th Cir. 1976); *EEOC v. Datapoint Corp.*, 570 F.2d 1264, 1269 (5th Cir. 1978). In such a case, it is a legitimate question whether statistics limited to a segment of the total picture can give rise to an inference of discrimination. No such question can exist, however, where, as here, there is an express agreement to discriminate in filling certain jobs.

defendants.[11] On this basis, and because of an asserted lack of numerosity,[12] the district court concluded that the case would not be treated as a class action, and that its decision would "not have any class application, . . ." 466 F. Supp. at 672, ILA App. 17-19.

In connection with its finding that the racial allocation of grain cargo work violates rights secured by Title VII and Section 1981, the court of appeals reversed the denial of class certification on this issue and certified a class, represented by the plaintiffs, composed of "all registered black longshoremen who were eligible for grain cargo work during the relevant time period." 673 F.2d at 756, ILA App. at 72. The case was remanded for the determination of an appropriate remedy.

This decision of the court of appeals is not inconsistent with the decision of this Court in either *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), or *General Telephone Co. v. Falcon*, 102 S. Ct. 2364 (1982). In *Rodriguez*, there had been no consideration of class certification in the district court. The plaintiffs stipulated that the only claims to be tried were their individual claims, and only their individual claims were tried. The trial resulted in a determination that the plaintiffs were not affected by the challenged employment practice because they were otherwise ineligible for the job in question. The court of appeals affirmed the lower court's de-

---

[11] As noted, the segregated union claim against the union defendants was upheld by the district court.

[12] The court of appeals found that the district court's determination of lack of numerosity was in error because "[d]uring the relevant time period, there were hundreds of blacks working in the Port of New Orleans any or all of whom might have been affected by the discrimination." 673 F.2d at 755, ILA App. at 70. NOSA, in its Petition in this Court, does not challenge the resolution of the numerosity issue by the court of appeals.

termination of the individual claims, but then certified a class, with plaintiffs as class representatives, and found class-wide liability. This Court reversed, because "it was evident by the time the case reached [the court of appeals] that the named plaintiffs were not proper class representatives. . . . [P]laintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practice." 431 U.S. at 403-04. In *Falcon*, the Court emphasized the requirement of Rule 23 that the plaintiff's claim and the claims asserted on behalf of the class present common issues of fact and law, and held, in the absence of the identification of an employment practice affecting applicants and employees in the same way, that a plaintiff complaining of the denial of a promotion could not represent a class of unhired applicants.

Here, pursuant to a determination of the district court, the case was tried as a class action. There has been no finding that the named plaintiffs were in any sense ineligible for grain cargo work. Plaintiffs' injury from the racial division of grain cargo work is similar to the injury of every other black longshoreman. "Class relief is 'peculiarly appropriate' . . . [because] 'the issues involved are common to the class as a whole' . . . [and] 'turn on questions of law applicable in the same manner to each member of the class.' " *General Telephone Co. v. Falcon*, 102 S. Ct. at 2370, quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

Plaintiffs' challenge to the racial division of grain cargo work is the prototype of a proper class action. No class action question warranting review by this Court is remotely presented.

CONCLUSION

For the reasons stated, the Petitions should be denied.

Respectfully submitted,

RICHARD B. SOBOL
(Counsel of Record)
ABOUREZK, SOBOL & TRISTER
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 775-5960

GEORGE M. STRICKLER, JR.
1419 Richards Building
New Orleans, Louisiana 70130
Attorneys for Respondents

Dated: February 16, 1983

APPENDIX

MEMBERS OF REGULAR GRAIN GANGS, BY RACE TEN DEFENDANT COMPANIES, 1971-1973

	1971		1972		1973		
Company	Whites	Blacks	Whites	Blacks	Whites	Blacks	Source of Data
Atlantic Gulf	15	15	16	16	12	13	Pl. Exh. 101D
Florio	5	5	8	8	8	8	Pl. Exh. 104E
Gulf	6	7	4	4	4	4	Pl. Exh. 105B
Louisiana Stevedores	NA	NA	4	4	4	4	Pl. Exh. 106E
Rogers	5	5	4	4	4	4	Pl. Exh. 110C
T. Smith	NA	NA	16	16	16	16	Pl. Exh. 112E
Strachan	NA	NA	NA	NA	8	8	Pl. Exh. 113D
J. Young	NA	NA	7	10	7	10	Pl. Exh. 114D
Southern	NA	NA	4	4	4	4	Pl. Exh. 115A
Mid-Gulf	NA	NA	9	10	NA	NA	Pl. Exh. 108A

"NA" means not available.